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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71 - 590

HIPOLITO VEGA,

Petitioner,

—against—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The petitioner, Hipolito Vega, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered against him in the above-entitled case on August 30, 1971.

A. The Opinion Below

There was no opinion nor finding of fact by the Trial judge who convicted the defendant for violation of 47 U.S. Code 508(a) and 18 U.S. Code 1621 ("payola" and "perjury"). The affirming opinion of the Circuit Court of Appeals on August 30, 1971, as docket number 71-1343, has not been reported. A stay of the mandate was requested

of the United States Circuit Court of Appeals on October 18, 1971, and has not yet been decided. Pursuant to an order of Honorable William J. Brennan, Jr., the Petitioner was granted an extension up to and including October 29, 1971.

B. Jurisdiction

The judgment of the Court of Appeals was entered on August 30, 1971. Petitioner Hipolito Vega is still enlarged on bail pending a decision of the Circuit Court of Appeals for a stay of the mandate. The jurisdiction of the Court is invoked under Rule 19 of the Supreme Court Rules and Title 28, United States Code, Section 1254(1) on the ground that the review by the Supreme Court by writ of certiorari is sought of a judgment of affirmance on appeal by the United States Court of Appeals for the Second Circuit.

C. Questions Presented

Was it constitutional error for the Court to accept a non-unanimous verdict in violation of defendant's non-waivable statutory and constitutional right to a unanimous verdict.

D. United States Constitution and the Statutes

United States Constitution, Sixth Amendment.

United States Constitution, Tenth Amendment.

United States Constitution, Fourteenth Amendment.

Statutes involved are: 47 United States Code 508(a) and 18 United States Code 1621.

Federal Rules of Criminal Procedure Rule 23(b).

E. Summary Statement of Matters Involved

A three hour trial before a jury consisted of testimony of co-conspirators Maestre and Orta as to alleged payments to defendant and the testimony of one Mr. Rosado as to an alleged, oblique admission by the defendant that everyone, including the defendant, was involved in payola.

Cross examination produced several conflicts, and the defense rested. The jury retired at 3:20 P.M. Friday, February 5, 1971. Two hours later the jury informed the Court they were unable to agree upon a verdict.

On Monday morning, February 8, the Court read to the jury what it characterized as a modified "Allen charge". Prior to that instruction, in the course of defense counsel's argument against an Allen-type charge at such an early stage in the jury's deliberations, the Court asserted to counsel that there would be an immediate retrial if the jury did not agree:

> We would only impanel another jury forthwith if this one does not agree, so it seems idle to try a case twice if we can try it once * * *.

At 11:36 A.M. the jury retired, and at 12:00 noon, a note informed the Court that the jury was not able to agree and had stopped deliberating.

The Court summoned the jury; stated that the case only would have to be tried again and advised the jury that it was considering a "simple case" wherein three witnesses testified that they paid money to the defendant, which the defendant had denied before the Federal Communications Commission. The jury then retired.

After defense counsel pointed out to the Court the inaccuracy of this summation of the case to the jury—only two witnesses had testified that they had made payments to Vega—the Court recalled the jury to correct its statement.

Almost immediately after the jury again retired, a note from Mr. Haag, one of the jurors, advised the Court that Mr. Haag was the primary holdout and could not change his opinion in good conscience. Mr. Haag requested in the note that the jury be dismissed. The Court then asked defense counsel whether he would accept "a jury verdict of 11" or a 10-2 verdict. Counsel declined, insisting that "we will only accept a unanimous verdict". Upon defense counsel's refusal to accept less than a unanimous verdict, the Court reiterated that the case would immediately be retried:

> Incidentally you will follow the case on trial before me, which may finish today or certainly tomorrow. Follow that case.

The Court asked again whether defense counsel would take a verdict of 10 jurors. Defense counsel stated that he would take a jury of 11. Defense counsel then turned to the defendant and asked for his concurrence:

> Would that be agreeable to you? I suggest you do it. You are not going to get a better trial. I am telling you that right now.

The record reflects no other conversation, between the Court and defendant or between counsel and defendant, before defense counsel confirmed to the Court that he would accept a verdict of 11.

The jury was then recalled. The Court excused Mr. Haag and sent 11 jurors back to the jury room:

> Mr. Haag, the Court has read your note to counsel and with the consent of the defendant and the government we are going to excuse you and tell the remaining jurors that we will take a verdict—they have agreed to accept a verdict of 11 jurors if you can agree. So you will return now to your deliberations. You are excused, Mr. Haag. I suggest you don't talk to anybody about this.

Very shortly after the truncated jury retired, another note was received by the Court from a juror by the name of Barbara Schulz. Miss Schulz was of the "same opinion" (as Mr. Haag) and asked that she be excused.

Before any action was taken with respect to Miss Schulz's note, the jurors sent word that they had reached a verdict. The verdict of guilty ensued.

The defendant's acquiescence to counsel's statement was not a clear and unequivocal waiver to a constitutional right and was therefore invalid. *Johnson* v. *Zerbst*, 304 U.S. 458.

F. Reasons for Granting Writ

POINT I

The affirmance by the Second Circuit Court of Appeals in this case is in direct conflict with the decision of the Sixth Circuit Court of Appeals in *Hibdon* v. *U. S.*, 204 F. 2nd 834. This court should grant a Writ of Certiorari to clarify the existing conflict between two Judicial Circuits of equal importance because this case presents a question of Constitutional interpretation.

POINT II

The decision of the Second Circuit Court of Appeals is in direct conflict with Rule 23(b) of the Rules of Criminal Procedure. This Court should grant a Writ of Certiorari to decide whether 23(b) of the Federal Rules of Criminal Procedure is consistent and firm with the defendant's right to trial by jury.

Rule 23(b) provides "Juries shall be of 12 but at any time before verdict the parties may stipulate *in writing* with the approval of the court that the jury shall consist of any number less than 12." (Emphasis supplied.)

The record indicates that trial counsel agreed to a waiver of 12 jurors by counsel's willingness to accept a verdict of 10 or 11, but the defendant did not agree on the record, and there was no stipulation by the defendant in writing. Neither was there the normal inquiry made by the Court as to whether or not the defendant understood the consequences of waiving a constitutional right.

The waiver under 23(b) is not lesser or greater than the waiver required under 23(a). This Court should grant a Writ of Certiorari to interpret Rule 23(b) and whether an attorney is capable of waiving a client's constitutional right.

CONCLUSION

In conclusion, the writ should be granted and the Court, in the exercise of its power, should order the judgment of conviction reversed.

Respectfully submitted,

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APPENDIX A

Judgment and Opinion of the United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 1025—September Term, 1970.

(Argued June 30, 1971 Decided August 30, 1971.)

Docket No. 71-1343

UNITED STATES OF AMERICA,

Appellee,

—against—

HIPOLITO VEGA,

Appellant.

Before:

MOORE, FEINBERG and MANSFIELD,

Circuit Judges.

Appeal from a judgment of conviction entered in the United States District Court for the Southern District of New York after a trial before Hon. Lloyd F. MacMahon, *Judge,* and a jury for violation of 47 U.S.C. §508(a) (illegal receipt of money for playing records over a radio station) and 18 U.S.C. §1621 (perjury in testimony before the Federal Communications Commission).

Affirmed.

VINCENT L. BRODERICK, New York, N. Y. (Phillips, Nizer, Benjamin, Krim and Ballon, New York, N. Y., and Leonard S. Baum, New York, N. Y., of counsel), *for Appellant.*

Appendix A

JOHN N. NIELDS, JR., Assistant United States Attorney, New York, N. Y. (Whitney North Seymour, Jr., United States Attorney for the Southern District of New York, New York, N. Y., Jay Horowitz, Assistant United States Attorney, New York, N. Y., on the brief), *for Appellee.*

MOORE, *Circuit Judge*:

The defendant Hipolito Vega appeals from a judgment of conviction, entered after a jury trial, for violation of 47 U.S.C. § 508(a)—unlawfully accepting money for the broadcasting of records over radio station WBNX without disclosing this fact to the station (sometimes referred to as "payola")—and 18 U.S.C. § 1621—perjury for falsely denying such receipt.

A somewhat unusual situation arose before verdict during the jury's deliberations. The appeal primarily is based upon this incident.

The trial was of short duration (three hours). Two government witnesses testified as to payments made to Vega, a third told of an admission by Vega that he had received money to play records. The perjury count was based upon Vega's denial under oath before the Federal Communications Commission in June 1966 of having received any money.

After the case had been submitted to the jury and after some two hours of deliberation, the jury sent to the Court a message reading, "Sorry. It seems that we cannot come to an agreement. Foreman" (Court Exh. 1). It being late

Friday afternoon, the Court excused the jury until Monday morning. At the opening of Court on Monday, defense counsel, anticipating that the Court would give the so-called *Allen* charge, said, "I believe the *Allen* charge would be a great disservice to the possible defense here." The Court did not agree and stated, "We would only impanel another jury forthwith." To the charge as proposed defense counsel said, "I have no objection to that charge, if your Honor please, none whatsoever." The additional charge was not productive of a verdict.

At noon a second note was received, reading, "Your Honor. Sorry to say that we cannot come to a definite decision. We have stopped deliberating as we cannot come to a final decision. Foreman" (Court Exh. 2). The Court again urged the jury to reach a decision at which point Juror number 12 attempted to address the Court but was told that any communication should be by note. A few minutes later a third note was received, reading, "Your Honor. I am the primary hold-out. I cannot change my opinion in good conscience and feel that to do so under pressure would violate my oath as a juror. I respectfully request that the jury be dismissed. Ralph Hoag." The Court read the message to counsel and said, "You have one guy holding out. I don't know which way he is. Do you want to accept a jury verdict of 11. I don't know which way they stand." Then followed colloquy between Court and defense counsel, critical to this appeal. When defense counsel, who was both experienced and skilled in the strategy of the courtroom asked for and was granted time to discuss the matter with his client, the Court pointed out that there might be other holdouts and asked whether the defendant

might take a 10 to 2 verdict, to which defense counsel replied:

> "Mr. Solomon: My feeling, very bluntly, as an old hand, Judge, is that some of the others are definitely, to my mind, more simpatico to defendants, so I don't think that I want to—I will ask the defendant, but I don't think I want to.
>
> "The Court: It is your choice."

After a conference with defendant and his wife, counsel advised the Court "We will only accept a unanimous verdict." The defendant then talked with his wife, after which the following colloquy occurred:

> "The Court: Take a verdict of ten jurors, agreement of ten?
>
> "Mr. Solomon: 11. If he says 'I am holding out.'
>
> "The Court: He says 'I am the primary one.'
>
> "Mr. Solomon: Let's see if we can get a jury of 11.
>
> "The Court: Will you take that?
>
> "Mr. Solomon: Yes.
>
> "The Court: Is that agreeable?
>
> "Mr. Solomon [apparently addressing the defendant]: Would that be agreeable to you? I suggest you do it. You are not going to get a better trial. I am telling you right now.
>
> (Pause.)
>
> "Mr. Solomon: Yes, 11, yes.
>
> "The Court: All right, bring the jury back. I will dismiss this one juror and tell the others.
>
> "Mr. Solomon: Right, absolutely and we will gamble on the rest. Absolutely.
>
> "The Court: All right."

Mr. Hoag was thereupon excused and the jury of 11 continued its deliberations. Another note[1] was then received from a juror but before any action was taken on it, a verdict was reached. Defense counsel said, "I understand that you are to disregard the note. They have a verdict." A discussion at the bench and off the record ensued after which the Court addressed the jury. "The Court: I understand you have asked me to disregard the note that was sent earlier. Is that correct?" "The Foreman: That is correct." No objection was taken by defense counsel to proceeding and the Foreman announced the verdict of guilty on both counts.

The conclusions to be derived from this record are clear beyond peradventure. The defendant was represented by competent counsel. Counsel during the selection of the jury and during the trial had an opportunity to select and appraise the jurors selected as best qualified to react favorably to the cause of his client. When the "holdout" crisis arose, the Court gave counsel every opportunity to exercise his courtroom judgment as to further proceedings. Counsel conferred with the defendant and the defendant with his wife. Counsel was unwilling to accept less than a unanimous verdict but definitely was willing to accept a jury of 11. And, as measured against some other jury on a second trial,

---

[1] "I am under the same opinion. May I be excused? Barbara Schulz."

it was obviously his considered judgment that in courtroom parlance the jury "looked good" to him.[2]

Now on appeal the defendant argues that he had a statutory and constitutional right to a unanimous verdict which could not be waived and charges the Court with error in accepting what he now describes as a "non-unanimous verdict."

The many cases and law review articles cited upon the subject of "Waiver of Jury Unanimity" are not applicable to the facts here presented. The defendant here did not waive (his counsel clearly refused to waive) his right to a unanimous verdict. He did have a unanimous verdict. His waiver, knowingly and advisedly given, was of his right to a jury of 12. Both Rule 23(b) and Rule 48 give to the parties the right to stipulate to a jury of less than 12, at any time before verdict. For this Court to hold otherwise would be to deprive a defendant of the opportunity to follow the advice of counsel of his own choice in making a critical decision. Defendant and his counsel probably believed that he was going to obtain a favorable decision from that particular jury and upon his agreed-upon jury of 11 he was willing to "gamble." No statutory or constitutional error can be found in his exercise of these rights.

In retrospect the defendant now believes that he was coerced into his waiver. Again the many other cases cited to support the requirement of knowing and voluntary

---

[2] The defendant and his counsel were apparently aware of the fact that of three others, indicted and tried on similar "payola" charges, two had been acquitted and one convicted, and that upon a retrial the Government would probably call an additional witness then en route from Florida (Tr. pp. 5-6).

waiver are inapplicable. Our decision must depend upon the facts of *this* case. The defendant's claim of coercion is based upon "the threat of the trial judge to re-try this case immediately." Counsel now says that "It is clear that a consideration of defense counsel in recommending a non-unanimous verdict was the threat by the trial judge to re-try this case immediately" (Applt's Br. p. 21). But counsel's position was quite positive that "We will only accept a unanimous verdict" and equally positive that he was willing to accept a jury of 11. The fact, now asserted, that the defendant was not "sophisticated in criminal procedure" is scarcely a persuasive argument. Because of this very fact defendants usually retain, as here, skilled counsel to protect their rights. Strong argument should be made by appellants but it should not be distorted. Nothing in the record supports the statement that the trial judge "twice suggested less than a unanimous verdict upon peralty of an immediate re-trial." The right to make a motion within seven days in the event that the jury is discharged without having returned a verdict, Fed. R. Crim. P. 29(c), did not arise. There was no "hung" jury. Had the jury been discharged without reaching a verdict *and* had the trial judge started a new trial within less than seven days *and* had objection thereto been made by defense counsel, a different situation might have arisen. But this state of facts is entirely hypothetical. Rule 29(c) provides that the motion for judgment of acquittal *may* be made "within 7 days" or "within such time as the Court may fix during the 7-day period." Had the trial judge abused his discretion, this would have been a proper appellate point but, in a case of such brief duration with no legal or factual prob-

lems of a complex character, it was logical for the Court, while the witnesses were available and counsel prepared, to endeavor to dispose of the case. This can hardly be called coercion.

Despite the Court's expressed desire for speed, there is ample proof in the record that defense counsel, in the interest of his client and in the exercise of his experienced judgment, elected with his client's consent to proceed with the jury he had selected and faced during the trial.

Lastly appellant's claim of error in refusing to postpone the trial because of the government's tardy filing of its bill of particulars does not constitute a ground for reversal. The revelation of Maestre and Orta as the payors of "payola" to Vega was not a surprise to Vega or his counsel. Maestre was named in the first count of the indictment. Furthermore, defense counsel knew that Vega was the person to whom it was asserted that Orta had made payments, first because counsel recognized that naming Baez as the recipient "was a typographical error on the government's part" and second, because Orta's 3,500 material which related to Vega had been given to counsel on a prior trial. No prejudice to Vega resulted from the delay in delivery of the bill.

Vega does not question the conviction on the perjury count on the merits. The same claim of error with respect to the jury would apply and for the reasons previously stated is rejected.

Judgment affirmed.

APPENDIX B

Judgment of the United States District Court

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

No. 68 Cr. 627

A JUDGMENT 71,340 ON MARCH 4, 1971 AT

UNITED STATES OF AMERICA

v.

HIPOLITO VEGA,

On this 24th day of February, 1971, came the attorney for the government and the defendant appeared in person and by J. Michael Solomon, Esq.,

IT IS ADJUDGED that the defendant upon his plea of not guilty and a verdict of guilty by a jury, has been convicted of the offense of unlawfully accepting and agreeing to accept moneys, services and other valuable considerations for the broadcast of records over a radio station without disclosing such acceptances and agreements to such station in advance of such broadcasts. (Title 47, U.S. Code, Section 508(a)); having taken an oath, unlawfully, wilfully and knowingly stating material matters which he knew were not true. (Title 18, U.S. Code, Section 1621). As charged in counts 1 and 2 and the court having asked the defendant whether he has anything to say why judgment should not

be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of THREE (3) MONTHS and FINED $1,500.00 on each of counts 1 and 2. The prison sentences and the fines are to run concurrently with each other. Total fine, of $1,500.00 is to be paid or the defendant is to stand committed until the fine is paid or he is otherwise discharged according to law.

Defendant is continued on his own recognizance until noon, Monday, March 8, 1971 at which time defendant is to surrender to the U.S. Marshal in room 318 for service of sentence.

A TRUE COPY

JOHN LIVINGSTON, Clerk
By: /s/ B. EDWARD,
Deputy Clerk

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ LLOYD F. MACMAHON,
United States District Judge.
/s/ JOHN LIVINGSTON
Clerk.

APPENDIX C

Indictment

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

68 Cr. 627

UNITED STATES OF AMERICA

—v.—

HIPOLITO VEGA,

Defendant.

The Grand Jury charges:

From on or about the 1st day of January, 1964, up to and including the 31st day of December, 1966, in the Southern District of New York, HIPOLITO VEGA, the defendant, an employee of radio station WBNX, unlawfully did accept and agree to accept moneys, services and other valuable consideration from Joseph Maestre and others to the Grand Jury known and unknown, for the broadcast of records over such station, without disclosing the facts of such acceptances and agreements to such station in advance of such broadcasts.

(Title 47, United States Code, Section 508(a).)

Appendix C

SECOND COUNT

The Grand Jury further charges:

On or about the 16th day of June, 1966, in the Southern District of New York, HIPOLITO VEGA, the defendant, having been called as a witness before a competent tribunal, to wit, the Federal Communications Commission, and before a competent officer and person, to wit, James D. Cunningham, DSL:al

48993

Chief Hearing Examiner, in a case in which a law of the United States authorized an oath to be administered, and having taken an oath that he would testify truly, did unlawfully, wilfully and knowingly state the following material matters, which, as the said HIPOLITO VEGA, then and there well knew, were not true:

> "Q. Did you, during the year '64, receive any money from record companies to play records?
> A. No.
> Q. From no one?
> A. No one.
> Q. Did any one associated or connected with any record company ever offer to pay you money for you to play a record on your program while you were broadcasting at WBNX in 1964?
> A. No, sir."

(Title 18, United States Code, Section 1621.)

ROBERT M. MORGENTHAU
United States Attorney

.....
Foreman